No. 88-192

In the Supreme Court
OF THE
United States

Supreme Court, U.S.
FILED
SEP 20 1988
JOSEPH F. SPANIOL
CLERK

OCTOBER TERM, 1988

McKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

The petitioner McKesson Corporation ("McKesson") respectfully submits this reply memorandum in response to the Brief of the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, and Office of the Comptroller, State of Florida (collectively, the "State") in opposition to McKesson's petition for a writ of certiorari.[1]

McKesson has asked this Court to hear this case to require Florida to properly consider the federal Constitution's limitations on the states' retention of unconstitutional taxes. In recent years, state legislatures and state courts frequently have frustrated taxpayers' attempts to retrieve unconstitutional taxes.[2]

The State does not respond directly to McKesson's arguments for this Court's granting the writ. Instead, the State raises a claim of sovereign immunity, asserts a challenge to McKesson's standing, and suggests that McKesson failed to seek alternative relief to a tax refund. The State's three arguments are frivolous.

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[1]McKesson's Rule 28.1 list has not changed and is attached as Appendix A to McKesson's petition for a writ of certiorari.

[2]In another petition for a writ of certiorari before this Court, *American Trucking Ass'n v. Smith, petition for cert. filed*, No. 88-325, (filed August 1988), petitioners ask the Court to review a decision of the Arkansas Supreme Court, which held that an Arkansas tax violated the Commerce Clause but nevertheless refused to order a refund of unconstitutional taxes.

I

McKESSON'S CLAIM FOR A TAX REFUND IN THIS CASE DOES NOT RAISE ANY SOVEREIGN IMMUNITY ISSUE

In raising the banner of sovereign immunity in this case, the State in fact has raised a red herring. While the doctrine of sovereign immunity provides that "no sovereign may be sued in its own courts without its consent," the doctrine does not, of course, apply where the sovereign has granted its consent. *Nevada v. Hall,* 440 U.S. 410, 416 (1979).

As the State well knows, Florida law has long permitted a taxpayer to challenge the validity of a tax and to seek a refund of invalid taxes. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A." *State ex rel. Victor Chemical Works v. Gay,* 74 So. 2d 560, 564 (Fla. 1954). *See also Reynolds Fasteners, Inc. v. Wright,* 197 So. 2d 295 (Fla. 1967) (challenging Florida tax on federal constitutional grounds, and seeking refund).[3]

The State nevertheless presses its sovereign immunity argument on the erroneous assumption that McKesson's claim for a tax refund, pursuant to section 215.26, Florida Statutes (1985), is in reality an "artfully disguised" tort action against the State of Florida. While Florida has consented to tax refund

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[3]The State's reference to the Eleventh Amendment discussion in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945), ignores that McKesson filed its suit in Florida state court, not in federal court. Indeed, the Court in *Ford Motor Co.* observed the "advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds," after which this Court could review any federal constitutional issues. *Id.* at 470.

actions it has not consented to "constitutional tort" actions. (State's Brief at 14-15)

McKesson has prosecuted this action, from its inception, as a claim for a tax refund precisely because McKesson could not pursue any other Florida action to obtain a measure of relief for the competitive injury it has sustained. The State's unsupported reasoning would transform any aggrieved taxpayer's legitimate refund action, challenging the constitutionality of a tax, into an illegitimate tort action.

The Florida Supreme Court ignored the State's sovereign immunity argument. This Court should ignore the argument as well.

II

THE FLORIDA SUPREME COURT DID NOT BASE ITS DECISION ON AN ADEQUATE AND INDEPENDENT STATE GROUND

Despite McKesson's position in this case as a victim of a discriminatory tax, the State appears to challenge McKesson's standing under Florida law to seek a tax refund. The State claims that McKesson was "merely [a] collection conduit[]" for the unconstitutional Florida tax and therefore suffered no injury.[4] (State's Brief at 11)

[4]The State's assertion that "McKesson never denied below that it passed the financial burden of Florida's beverage excise tax on to its customers" is nonsense. (State's Brief at 10-11) A "pass-on" argument in this context is economic chicanery. McKesson has argued consistently that regardless of whether it raised its prices to cover the discriminatory tax burden, thereby losing market share to the favored competitors, or did not raise its prices to cover the discriminatory taxes, thereby reducing its profits, McKesson has sustained an economic injury.

The State cites *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So. 2d 529 (Fla. 1973), where the Florida Court found that the alleged taxpayer in that case in fact "bore no tax liability." *Id.* at 532. The Court held that "[o]ne who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury" and therefore does not have standing to challenge the tax collection. *Id.*

In this case, however, the Florida Supreme Court, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), expressly found that "as [a] wholesale distributor[] . . . of alcoholic beverages who [is] liable for taxes under Florida's alcoholic beverage tax scheme, [McKesson has] standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on [its] business[]." (Appendix B to McKesson's Petition at 5a) Further, the Florida Supreme Court found that the tax scheme "clearly raises [McKesson's] relative cost of doing business." (*Id.* at 17a) The Florida Supreme Court did not share the State's view that McKesson, as a taxpayer, has not suffered any injury.

Moreover, section 215.26, Florida Statutes (1985), establishes McKesson's standing under Florida law to seek a tax refund in this case. Section 215.26 provides that the comptroller shall pay the tax refund to the person who paid the tax. The State cannot dispute that McKesson, as a wholesale distributor of alcoholic beverages, in fact paid the unconstitutionally discriminatory excise taxes on its alcoholic beverages. Under section 215.26, and according to the Florida Supreme Court's opinion in this case, McKesson has standing to challenge the constitutionality of the Florida alcoholic beverage tax scheme and to seek a refund of taxes unconstitutionally collected.

The Florida Supreme Court never suggested in its opinion that the Court has based its rejection of McKesson's federal

constitutional arguments for a refund on independent state law grounds. The Florida Court did suggest that, although McKesson has standing, McKesson may have passed the tax on to its customers.[5] The Florida Court refers to a "pass-on" as one of the "equitable considerations" for rejecting McKesson's argument that *both* the federal Constitution and Florida law compel a remedy for unconstitutional state taxes. (Appendix B to McKesson's Petition at 21a) The Court cites a decision of this Court, *Lemon v. Kurtzman*, 411 U.S. 192 (1973), to support its reasoning.

The Florida Court's decision certainly does not "indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). In announcing the "requirement of a 'plain statement' that a decision rests upon adequate and independent state grounds," this Court noted:

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."

Id. at 1041-42 (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). This Court has jurisdiction to decide this case.

[5]The Florida Court never reconciled its finding that McKesson has standing because it suffered competitive harm as a result of Florida's discriminatory tax scheme with its speculative statement that McKesson may have engaged in a "pass-on" of taxes. (Appendix B to McKesson's Petition at 21a)

III

McKESSON HAS PURSUED EVERY OPPORTUNITY FOR RELIEF

Finally, the State asserts that McKesson in this case "did not timely pursue an effective remedy available to it" that would have obviated McKesson's claim for a tax refund. (State's Brief at 23) The State's assertion is incomprehensible.

The State argues that McKesson should have sought a temporary injunction to avoid paying the challenged taxes during the litigation. (State's Brief at 20-22) The State cites *Lee v. Bond-Howell Lumber Co.*, 166 So. 733 (Fla. 1936), *Atlantic Nat. Bank of Jacksonville v. Simpson*, 188 So. 636 (Fla. 1938), and *Overstreet v. Ty-Tan, Inc.*, 48 So. 2d 158 (Fla. 1950), to demonstrate that Florida courts have granted injunctions in tax cases.

The State's argument that McKesson failed to seek preliminary relief does not make sense. After exhausting all administrative remedies, as Florida law requires, McKesson filed this action in Florida circuit court. One month later, McKesson filed a motion for an injunction to enjoin the State's enforcement of the discriminatory tax scheme. Six months later, after finding the tax scheme unconstitutional, the circuit court entered an order granting McKesson's motion for an injunction. However, the State's notice of appeal automatically caused a stay of the circuit court's order under the Florida Rules of Appellate Procedure.

McKesson immediately moved the court to vacate the automatic stay, arguing that continued enforcement of the unconstitutional tax scheme would further expose Florida's revenues to claims for refunds. McKesson invited the State to join in the

motion but the State declined. The court denied McKesson's motion.

In light of the continuing stay of the circuit court's injunction, pending appeal, McKesson sought immediate review in the Florida Supreme Court. Again, McKesson noted that continued enforcement of the tax scheme exposed Florida's revenues to refund claims. The Florida Supreme Court agreed to hear the case on an expedited basis.[6]

The State also asserts that McKesson could have escrowed or self-accrued the challenged taxes during the litigation. (State's Brief at 19-20) To support this proposition, the State cites *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892 (1985). In *Eastern Air Lines*, however, the State and Eastern agreed by *stipulation* that Eastern could self-accrue the challenged taxes. *Id.* at 313. No provision in Florida law granted Eastern the right to self-accrue.

In this case, when an escrow arrangement was proposed at the Florida circuit court hearing on McKesson's motion to vacate the automatic stay, Assistant Attorney General Brown,

[6]The State, citing *American Trucking Ass'n v. Gray*, 483 U.S. ___, 108 S.Ct 2 (Blackmun, Circuit Justice 1987), also appears to suggest that McKesson should have applied to this Court for relief, before prosecuting its case in the Florida courts. (State's Brief at 19) In the *Gray* case, Justice Blackmun intervened only after this Court had already resolved the constitutional issue and only after the applicants had already exhausted their remedies, on remand, in the Arkansas courts. The State appears to suggest that McKesson should have tried to use the same extraordinary procedure even before the Florida Supreme Court had considered the case. Thus, the State's suggestion ignores the rule that "[t]he Circuit Justice's injunctive power is to be used 'sparingly and only in the most critical and exigent circumstances'. . . and only where the legal rights at issue are 'indisputably clear.'" *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, ___ U.S. ___, 107 S.Ct 682, 683 (Scalia, Circuit Justice 1986) (citations omitted).

representing the State, responded: "On that one, Your Honor, I've got to jump up and scream." Mr. Brown stated that "[t]he State would object to [the escrow arrangement] most strenuously." Mr. Brown noted that a refund remedy, if necessary, would be more appropriate. In light of the State's strenuous opposition to an escrow arrangement, the State's present assertion that McKesson could have secured an escrow arrangement is disingenuous at best.

Contrary to the State's assertions, McKesson pursued every available opportunity to seek relief.

CONCLUSION

Unfortunately, this Court's Commerce Clause decisions have not prevented Florida (and other states) from creating an unconstitutional whipsaw: enacting successive discriminatory tax schemes and denying the victims any retroactive relief. McKesson's constitutional challenge to Florida's taxation scheme squarely presents the question of whether, and to what

extent, the federal Constitution limits the states' retention of unconstitutional taxes.

Dated: September 19, 1988

Respectfully submitted,

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